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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ZULA, LLC,

Plaintiff and Respondent,

v.

TSEGA HAILE,

Defendant and Appellant.

A123759

(Sonoma County
Super. Ct. No. SCV243269)

Appellant Tsegai Haile filed an initial and an amended notice of appeal purporting to challenge several trial court orders. In a June 2009 decision, we dismissed the entire appeal for lack of jurisdiction. (*Zula, LLC v. Haile* (June 10, 2009, A123759) [nonpub. opn.]) We granted rehearing on our own motion after we determined that one aspect of the appeal—the challenge to an order denying Haile’s motion to disqualify Zula’s counsel—is properly before us. After rehearing, we again find that most of the purported appeal must be dismissed for lack of jurisdiction, either because the underlying orders are not appealable or because the notice of appeal was untimely. The appeal from the order denying the motion to disqualify opposing counsel is properly before us, but we affirm that order on its merits.

I. ORDER OVERRULING DEMURRER

In May 2008,¹ respondent Zula, LLC—a California limited liability company—removed appellant Tsegai Haile as one of its managers. When Haile refused to

¹ All dates refer to the 2008 calendar year unless otherwise indicated.

acknowledge his removal, Zula filed a complaint seeking to enjoin him from purporting to act on Zula's behalf and seeking damages. In August, the trial court granted Zula's motion for a preliminary injunction. The preliminary injunction was filed on September 3. A September motion for reconsideration of the order granting the preliminary injunction was denied in October.²

Later in October, Haile demurred to the complaint and asked the trial court to strike the pleading. On December 9, the trial court overruled the demurrer and denied the motion to strike the complaint. In his December 11 notice of appeal, Haile purports to appeal from these orders. Neither of these are appealable orders. (*Harmon v. De Turk* (1917) 176 Cal. 758, 761 [order overruling demurrer]; see *Yandell v. City of Los Angeles* (1931) 214 Cal. 234, 235 [order granting motion to strike]; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 154-155, pp. 230-232.) We have no jurisdiction to consider the merits of an appeal from a nonappealable order. (See *Beazell v. Schrader* (1963) 59 Cal.2d 577, 579-580; see 9 Witkin, Cal. Procedure, *supra*, Appeal, § 86, pp. 146-147.) Thus, we must dismiss this purported appeal.

II. ORDER DENYING DISQUALIFICATION OF OPPOSING COUNSEL

A. Appealable Order

On December 1, Haile also moved to disqualify Zula's counsel. In January 2009, the trial court denied this motion. By this time, Zula had obtained a default judgment against Haile, who failed to file a timely answer to the complaint after his demurrer was overruled. On January 15, 2009, Haile filed an amendment to his December notice of appeal, purporting to include within its ambit a challenge to the order denying his motion to disqualify opposing counsel.³

In our June 2009 decision, we held *inter alia* that the order denying Haile's motion to disqualify opposing counsel was not an appealable order. After rehearing, we now

² Notice of entry of the order denying reconsideration was given on November 24.

³ As the orders challenged in the January 2009 amendment to the notice of appeal are unrelated to the orders challenged in Haile's December appeal, we deem this "amendment" to constitute a separate notice of appeal from the order denying his motion to disqualify opposing counsel. (See Cal. Rules of Court, rule 8.100(a)(2).)

conclude that our earlier ruling was incorrect. An order denying a motion to disqualify an attorney is an appealable order, whether as a denial of injunctive relief or as a final order on a collateral matter unrelated to the merits of the underlying litigation. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 215-217; *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 452-453; *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1052-1053 fn. 1.)

However, the disqualification of counsel is a collateral matter unrelated to the merits of the underlying litigation. (*Meehan v. Hopps*, *supra*, 45 Cal.2d at pp. 215-217.) Thus, our decision on rehearing may address only the merits of the order denying the motion to disqualify opposing counsel. As that is a collateral matter unrelated to the merits of the underlying litigation—the preliminary injunction—our decision on rehearing cannot address the merits of that injunction, unless that injunction is otherwise properly before us on appeal. (See pt. III., *post*.)

B. *Effect of Default*

By the time that the trial court ruled on Haile's motion to disqualify Zula's counsel, a default judgment had entered against Haile. As Haile was then in default, he was no longer an active party to the litigation and no longer entitled to take any action in the case. (See *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1301; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 343-345 [when defendant allows default to be entered, defendant is precluded from urging disqualification of judge]; see also 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 175, pp. 617-618.) For this reason, the trial court properly denied the pending motion to disqualify Zula's counsel.

III. PRELIMINARY INJUNCTION

Finally, we consider the possibility that Haile perfected an appeal from the September 3 preliminary injunction. In his opening brief, Haile appears to challenge this injunction, although neither of his notices of appeal refer to it. In those notices of appeal, he purports only to challenge the orders overruling his demurrer, denying his motion to strike the complaint and denying his motion to disqualify opposing counsel, and any intermediate rulings related to those orders. In his reply brief, Haile urges us to liberally

construe his notice of appeal to perfect an appeal from the preliminary injunction. He reasons that it was reasonably clear from his notice of appeal that he was challenging the injunction and urges us to conclude that Zula could not possibly have been misled or prejudiced by his lack of specificity.

We disagree. Neither notice of appeal makes any reference to anything other than the orders cited, except to include other intermediate rulings and proceedings involving the merits of the matter or necessarily affecting the order or judgment appealed from. A preliminary injunction is not an intermediate ruling but an independently appealable order. (*Natomas Union School Dist. v. Grant Joint Union High School Dist.* (1993) 14 Cal.App.4th 350, 355 fn. 2 [preliminary injunction]; see Code Civ. Proc., § 904.1, subd. (a)(6) [injunction]; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 174, pp. 249-250.) It is not related to the orders specifically appealed from, which challenge the legal sufficiency of the complaint and the conduct of opposing counsel. (See pt. II.A., *ante*.) Haile filed no appeal from the injunction and, contrary to his assertion, we find that Zula would be misled or prejudiced if we extended the import of the words of his notices of appeal to perfect an appeal from the preliminary injunction.

Even if the language of the notices of appeal could be reasonably construed to refer to the September 3 preliminary injunction, it appears that the earlier of the two—the December 11 notice of appeal—would be untimely. Although the record on appeal contains no evidence of when written notice of the preliminary injunction was formally given to Haile, he moved for reconsideration on the same date that the preliminary injunction was filed. This prompt response may allow us to infer that Haile was served with the preliminary injunction on the date that it was issued. Calculating from that date, the 60-day period for filing a notice of appeal from the injunction expired in early November, more than a month before the December 11 notice of appeal was filed. (See Code Civ. Proc., §§ 12-12b; Cal. Rules of Court, rule 8.104(a).)

That time period was not extended by Haile's motion for reconsideration. A party affected by a trial court order may apply for reconsideration of that order within 10 days after service of written notice of entry of the order. The application for reconsideration

must be based on new or different facts, circumstances or law. (Code Civ. Proc., § 1008, subd. (a); see *Crotty v. Trader* (1996) 50 Cal.App.4th 765, 771.) Haile filed a motion for reconsideration of the preliminary injunction on September 3. A *valid* motion for reconsideration can extend the time for filing a notice of appeal. (Cal. Rules of Court, rule 8.108(e).) However, the trial court concluded that Haile's motion for reconsideration did *not* comply with the statutory requirements for filing such a motion. (See Code Civ. Proc., § 1008, subd. (a).) If the motion for reconsideration was invalid, it could not operate to extend the time for filing a notice of appeal from the appealable order. (See *Cox v. Certified Grocers of Cal. Ltd.* (1964) 224 Cal.App.2d 26, 30 [untimely notice of motion for new trial]; Cal. Rules of Court, rule 8.108(b)-(e) [requiring valid post-order motion to extend time for filing notice of appeal].)

Thus, even if the December 11 notice of appeal could be construed to perfect an appeal from the September 3 preliminary injunction, that notice of appeal was not timely filed. Under these circumstances, we would have no jurisdiction to consider the merits of a purported appeal from the preliminary injunction, but would be required to dismiss it. (See *Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 437-438; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 614, pp. 689-690.)

The purported appeals are dismissed. The order denying the motion to disqualify opposing counsel is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.